FEDERATION REPORTS

In re NG TOH PIEW, DECEASED; TAN GEOK ENG *(f)* v. LOK AH NG *(f)*.

[Orig. Civ. Juris. (Jobling, J.) September 27, 1950]

[Penang — Probate No. 70 of 1950]

Wills — Testamentary capacity — Soundness of mind — Deficient memory — Oblivious concerning relatives.

If at the time of making his will a testator was, through disease, so deficient in memory that he was oblivous to the claim of his relatives and if that forgetfulness was an inducing cause of his choosing others to be his legatees his will is invalid. The will in this case was pronounced invalid.

Case referred to:—

(1) *Battan Singh v. Amirchand* (1948) 1 All E.R. 152 (P.C.).

PROBATE.

Ong Huck Lim for the plaintiff.

R. D. Hume for the defendant.

The facts sufficiently appear from the judgment.

Cur. Adv. Vult.

Jobling, J. : — Probate of the will of the deceased Ng Toh Piew was granted to the defendant on the 9th March, 1950. The will was dated 19th January, 1949 and the deceased died on 29th January, 1949. The plaintiff has now applied to the Court to revoke this grant and to pronounce in favour of a former will made by the testator and dated 31st October, 1947.

The grounds of this application are that the testator was not of sound mind, memory or understanding at the time he made the later will and also that its execution was obtained by the undue influence of the defendant.

No evidence was produced of undue influence and that ground was dropped.

The facts admitted in this matter are that the testator lived in Station Road, Bukit Mertajam, where he carried on the business of a coffee shop and hotel, that he suffered from tuberculosis and that when the disease became acute he first moved to a house in Low Chee Kampong from whence, when it appeared that he had not long to live, he moved again to a room in Kovil Kampong, his nephew Goh Seng Kee attending to the business and leasing it out at $250/- a month.

The will dated 31st October, 1947 was made after the testator had been examined by a doctor and it is clear that he was then in a fit state of mind and memory to dispose of his estate. The will provided for his executor to pay maintenance to each of his widows and to hand over the whole of his estate to his son on his attaining twenty-one.

The only complaint made by defendant about this will is that she says she was not informed of it.

The will dated 19th January, 1949 was made ten days before the testator's death. Defendant says that the testator asked one Wong Ah Choy to get a solicitor as he wanted to make a will. Wong Ah Choy cannot be found and there is no corroboration of this evidence, but it is clear from the evidence of the witness Rajan that Wong Ah Choy did come to him and ask him to make a will. Rajan and Wong Ah Choy went to deceased's house taking with them a peon named S. S. K. Samy and deceased gave instructions in the Chinese language for drawing the will. These instructions were interpreted into Malay by Wong Ah Choy and noted down by Rajan who then went back to his office and prepared the will, returning to deceased later on the same day. The deceased then signed the will in the presence of Wong Ah Choy and Rajan and Samy, after it had been read over to him in Malay by Rajan and interpreted into Chinese by Wong Ah Choy.

There was evidence that deceased understood Malay and that he had conversed in this language with the doctor who examined him when he made his previous will on 31st October, 1947.

The will after being signed by deceased was witnessed by Rajan and Samy and handed to defendant.

The defendant and Rajan and Samy all assert that deceased was mentally normal at the time he gave the instructions and signed the will although they admit he was very ill and weak.

It is extremely unfortunate that Wong Ah Choy cannot be called to give evidence and it is also to be regretted that a doctor was not obtained to examine the deceased when he made the will. Rajan says he suggested this to defendant who did not want it, saying she had no money.

The will left everything to defendant and made no mention of deceased's son. Rajan says the deceased told him he had no children. Samy gives a different account saying that deceased told Rajan he had a child but the latter's evidence was not very satisfactory and he says himself he was taking no interest in the matter. Rajan was the person most concerned and I regard him as a much more reliable witness. I therefore accept his evidence and disregard Samy's.

On this evidence I am asked to find that the will of 19th January, 1949 was made when the testator was not of sound mind.

The facts that I have to consider are first, that the testator was extremely ill at the time; secondly, that the will is extraordinary in that it makes no provision for his son — a most unusual omission for a Chinese testator to make — and thirdly, that the testator told Rajan that he had no child. There is a further matter which I must also bear in mind, namely that the instructions for drawing the will were given in Chinese and interpreted by a person who has not been called and that the prepared will was also interpreted by the same person to the testator in Chinese. There is, therefore, no certain evidence of what was conveyed to the testator. The fact that the will was read over in Malay first and that the testator had some understanding of Malay is, of course, of importance but Malay was not the testator's mother tongue and the fact that it was interpreted into Chinese for his benefit indicates a doubt of his proper understanding of what was said in Malay.

As regards the first fact, there is the evidence of Dr. Somasundaram that patients suffering from tuberculosis are not usually affected mentally by this disease until about five or six hours before death, unless there are complications, of which there is no evidence here.

As regards the second fact that the will is extraordinary the defendant explains this by alleging that plaintiff quarrelled frequently with deceased, that she demanded money from him and when this was refused departed in a fit of anger leaving her child behind. This story is corroborated by Lee Nam who says deceased told him he was heart broken that plaintiff did not come and look after him and that he intended leaving all his property to defendant. He also said deceased informed him that plaintiff had left her child with him.

There is a direct conflict of evidence on this point as plaintiff denies that she ever quarrelled with deceased and alleges that she and defendant took turns of living with deceased and looking after him. Also she says she never demanded money from deceased and has never at any time been separated from her child. Her story was confirmed by decased's nephew Goh Seng Kee, who appeared to be a reliable witness and to have justified deceased's trust in him.

In these circumstances I can only say that defendant's explanation does not satisfy me and I must regard the will as an extraordinary one for a Chinese to make. I think that fact coupled with the fact that deceased told Rajan that he had no child is sufficient to justify a finding that owing to his illness deceased's memory was not sound at the time he gave instructions for the will.

In *Battan Singh v. Amirchand*[1] it was held that if at the time of making his will a testator was, through disease, so deficient in memory that he was oblivious to the claims of his relatives and if that forgetfulness was an inducing cause of his choosing others to be his legatees his will is invalid.

I think this ruling exactly fits the circumstances of this case. The testator was oblivious to his son's claims owing to his memory being deficient through illness and it was his deficiency in memory that caused him to omit his son from his will and to say to Rajan that he had no child. I therefore pronounce the will dated 19th January, 1949 to be invalid and revoke the grant of probate thereof.

The will dated 31st October, 1947 has been proved in solemn form and I pronounce it to be the true last will of the testator.

Costs to be taxed and paid out of the estate including profit costs.

Will pronounced invalid.

SP. PL. PALANIAPPA CHETTIAR v. V.R.M.V. LETCHUMANAN CHETTIAR.

[Orig. Civ. Juris. (Jobling, J.) September 15, 1950]

[Penang — Civil Suit No. 261 of 1949]

Vendor and purchaser — Contract for sale — Covenant to extract grant of letters of administration — Default of vendor in obtaining grant of letters of administration — Specific performance — Damages.

In this case the defendant entered into an agreement for sale of certain property in Burmah Road belonging to his deceased father to the plaintiff for $105,000/- Japanese currency and this amount was paid to the defendant by the plaintiff. The defendant agreed and covenanted to extract the grant of letters of administration as early as possible and to apply to Government for the necessary permission to sell the land to the plaintiff.

The defendant did not do all he could to carry out his obligation to extract the grant of letters of administration. He also renounced his right to the grant.

The plaintiff claimed specific performance of the agreement for sale or alternatively for damages.

Held, that the plaintiff having performed his part of the contract was entitled to damages. The Court applying the principle laid down in **Day v. Singleton**[1] awarded the plaintiff damages and assessed it at $30,000/-.

Case referred to:—

(1) *Day v. Singleton* (1899) 2 Ch. 320.